KK SHARMA
LAW OFFICES

Monthly Newsletter

State of Antitrust

May 2019; Volume 6 Issue 5

Economic Laws | Governance, Regulations and Risk | Public Affairs and Policy

Romanian Competition Council conducts dawn raids

South Africa's Competition Commission refers two cases to theCompetition Tribunal for collusive conduct

Netherland Authority for Consumers and Marketconducts dawn raid for the first time

Between the Lines

Delhi High Court looks intothe constitutional validity of provisions of the Indian Competition Act

Heard At The Bar

- **President of E-commerce Company pleads guilty**
- **European Commission fines General Electric 52 million euros for providing incorrect information in LM Wind takeover**

AND MORE...

Romanian Competition Council conducts dawn raids

The Romanian Competition Council (RCC) carried dawn raids at the headquarters of certain auto and insurance companies, in continuance of their investigation triggered in 2017 on the market of services for motor vehicle maintenance. The investigation on the companies, which were possibly participating in the discussions/negotiations conducted by the Association of Dacia, Renault and Nissan Dealers (ACODAREN) for setting the tariffs/discounts and several other trading discussions, is expected to be finalised this year. Dawn raids were also conducted in 2017, over eight headquarters and working place of ACODAREN and some of its member companies, to collect the relevant information on possible anti-competitive agreement.

The RCC has broad investigatory powers to prosecute hard core cartels as administrative violations and such powers include the right to conduct dawn raids on business premises in order to obtain all the information. Further, such raids are to be authorised by the Bucharest Court of Appeal. The RCC has, previously in 2018, imposed sanctions on nine companies and UNSAR (National Union of Romania Insurance and re-insurance Companies) with a total fine of 53 million euros for breach of National and European Competition rules, by coordinating their behaviour to increase insurance tariffs. *(Press Release, April 2019)*

South Africa's Competition Commission refers two cases to the Competition Tribunal for collusive conduct

Recently, the South African Competition Commission (SACC), under theprovisions of South African Competition Act (SA Act),referred two cases to the South African Competition Tribunal for prosecution. The first case involves two companies *viz.,* K F Computers and SAAB GrintekDefense (SAAB), which are in the business of network maintenance services, for collusive tendering violatingprovisions of the SA Act. They decided to submit bids for atender floated by State Information Technology Agency (SITA) to procure network maintenance and system support services. In March 2016, the conduct was brought into the light through a complaint from SITA made to the SACC alleging that the companies had coordinated their response to receive the contract. Also, theSACC found that the companies discussed and agreed their respective tender bids.

The second case is against two companies, viz., Mpact Ltd (Mpact) and New Era Packaging (Pty) Ltd (New Era) and they are in the business of manufacturing and supplying packaging paper products. The companies are observed to be involved in fixing prices, dividing markets by allocating customers and tendering collusively in the market for the manufacturing and supplying of corrugated packaging paper products violating the provisions of the SA Act. In May 2016, the investigation was initiated by SACC against Mpact and New Era which included dawn raids.During the investigation, it was found that from the 1980s to 2015, Mpact and New Era had an agreementnot to compete with each other for customers to supply packaging paper products. The SACC found that the companies achieved this by agreeing to allocate customers and ensuring that they did not bid in competition with each other in respect of the allocated customers. The anti-competitive conduct of Mpact and New Era also included rigging the bids that they submitted to customers in order to prevent other market players from competing with them.

(Notice 264 of 2019, May 2019)

Netherland Authority for Consumers and Market conducts dawn raid for the first time

In March 2019, Netherland Authority for Consumers and Market (ACM) conducted dawn raids for the first time under newly adopted European Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) on an unnamed electricity market company for possible violation of Article 3 REMIT. Article 3 REMIT prohibits the use of inside information in relation to wholesale energy product from acquiring, disposing, attempting to acquire, dispose the product, or disclosure of information. ACM with intent to boost and ensure consumer & market participants' confidence enforced the compliances of REMIT.

The raid was conducted with two purposes *viz.*,toestablish whether the company has violated REMIT and whether the company had published inside information correctly while all market parties having same information at the same time. If investigation concludes that infringement indeed has occurred, after a chance of defence being given to the perpetrator, sanctions could be imposed. *(Press Release, April 2019)*

KK SHARMA
LAW OFFICES

Heard at the BAR

Legal news from India and the world

President of E-commerce Company pleads guilty for conspiring to fix prices

AkilKurji, president of Gennex Media, an e-commerce company, entered into a guilty plea for conspiring to fix prices for customized promotional products sold online to customers in the United States (US).The prosecution against AkilKurji arose from an on-going antitrust investigation in the online promotional products industry, conducted by Antitrust Division's Washington Criminal I Section, with the assistance of the US Attorney's Office and FBI.

According to the felony charges, AkilKurji and his co-conspirators agreed to fix the prices of customized promotional products*viz*., wristbands, lanyards, temporary tattoos, and buttons, and sold online from May 2014 to June 2016. They used social media platforms and encrypted messaging applications, such as Facebook, Skype, and Whatsapp, to reach and implement their illegal agreements.

The conspirators are charged with price fixing, which is a federal offense under Section 1 Sherman Act which carries a maximum sentence of 10 years in prison and a $1 million fine. The maximum fine for an individual may be increased to twice the gain derived from the crime or twice the loss suffered by victims of the crime, if either of those amounts is greater than the statutory maximum fine.

The plea agreement entered by Kurji and co-conspirators is being filed before the US District Court of the Southern District of Texas. Kurji is the 5thindividual to enter into a guilty plea with the US-Department of Justice, which is committed to detect and prevent collusion carried out using encrypted messaging applications and social media platforms.

(Press Release, April 2019)

European Commission fines General Electric 52 million euros forproviding incorrect information in LM Wind takeover

General Electric (GE)notified the European Commission (EC) itsproposed acquisition of LM Wind in January 2017. Inthis notification, GE confirmed that it did not have any higher power output wind turbine for offshore applicationsin development, beyond its existing 6 megawatt turbine. However, theEC found, through third party information, that GE was offering a 12 megawatt offshore wind turbine to potential customers.As a result, GE withdrew its notification of acquisition of LM Wind and re-notified the same transaction. This time GE included complete information on its future project and on 20.03.2017, the EC approved the proposed acquisition.

Subsequently, in July 2017, the EC addressed a Statement of Objections to GE alleging that it had breached its procedural obligations under Regulation No. 139/2004 of 20.01.2004(EUMerger Regulation). On the investigation conducted by the EC, it was confirmed thatGE had indeed been offering a higher power output offshore wind turbine and the first notification was found to be incorrect. The EC found GE committing serious infringement by providing misleading and incorrect information for the assessment of transaction and has violated EU Merger Regulations. Thus, a fine of 52 million euros was imposed for breaching the obligation to provide with correct information, and this imposition of fine on GE would not have effect on the EC's approval for transaction.

(Press Release, April 2019)

BMW, Daimler and Volkswagen receives Statement of Objections from European Commission

In October 2017, the European Commission (EC) carried out inspections at the premises of BMW, Daimler, Volkswagen (VW) and Audi in Germany, as part of the EC's initial inquiries into possible collusion between car manufacturers on the technological development of passenger cars. Subsequently, the EC opened up an in-depth investigation in September 2018 and issued Statements of Objections (SOB) to BMW, Daimler and VW. The EC expressed its preliminary view that they may have broken EU competition rules from 2006 to 2014 by colluding and restricted competition in development of technology to clean emissions from petrol and diesel passengers' carsin the European Economic Area (EEA).

In SOB, it is found that the car manufacturers' aimed to restrict competition on innovation of two emission cleaning systems and consumers were prevented to buy less polluting cars even if such technology is available. The parties are allowed to exercise their right to defenceand can examine the documents in the EC's investigation file, reply in writing and request an oral hearing to present their comments.

Such market behaviour, if confirmed, entails price fixing or market sharingviolating Article 101(1)(b) of the Treaty on the Functioning of the European Union and Article 53(1) (b) of the EEA Agreement.

(Press Release, April 2019)

KK SHARMA
LAW OFFICES

Between
The Lines...

Delhi High Court looks into the constitutional validity of the provisions of the Indian Competition Act

In the first fortnight of April, 2019, the Hon'ble Delhi High Court ('DHC') pronounced a judgement in the case of Mahindra Electric Mobility Limited and Anr. Vs. Competition Commission of India and Anr. and other connected matters pertaining to a challenge under article 226 of the Constitution of India to some provisions of the Competition Act, 2002 ('Act') and some regulation framed by the Competition Commission of India ('Commission').The provisions of Finance Act, 2017 were also challenged but not pressed because of pending proceedings before Hon'ble Supreme Court ('SC'). At the root of these challenges in an information filed against some Automobile Manufactures ('OEMs') about the abusive conduct in the spare parts' market.

After the directions to the Director General ('DG') and receiving the report of DG, the scope of the investigation was enhanced , after concurrence from CCI. In the mean time, one of the OEMs approached Madras High Court and obtained a stay on the proceedings which barred the Commission from taking the final view in that matter though the investigations continued. Some applications filed by some of the Respondents before the Commission challenging the legal proprietary of certain decision making process were not accepted by the Commission. The entire arguments of the Respondents centred around whether CCI is performing adjudicatory or regulatory functions and, if the tilt is towards the former, should it predominantly be manned by persons with judicial background.On the contrary, the contention of CCI was that it is essentially an expert body whose decisions are, subsequently, being scrutinised by a judicial body in the form of an Appellate Tribunal. After hearing the arguments, DHC framed 6 issues which essentially centred around whether the Commission was a Tribunal exercising judicial functions or was it performing administrative and investigative functions and also adjudicating issues before it; does it violate the doctrine of separation of powers; whether section 22(3) of the Act is unconstitutional; is the changing composition of members hearing the matters and signing the orders, because of retirement etc., called 'revolving door' by the Petitioners, vitiate the provisions of the Act or the decisions given by it; whether the clearance for enhancement of scope of investigation to DG was illegal and whether section 27(b) of the Act is unconstitutional in absence of a separate hearing on quantum of penalty.

After examining all the arguments in depth and going into the history of evolution of competition law, as it exists today, the DHC found that the Commission is not a Tribunal exercising exclusive judicial powers. Rather, it exercises quasi judicial powers. Further, it opined that there is no bright line or tipping point where the demarcation between adjudicatory and administrative/regulatory powers can be put. After examining a good number of orders passed by the Commission where, on account of retirement etc., the set of persons signing the order and the set of persons hearing the matter were not identical, it held that there should not be any change in the composition of bench after the final hearings have begun. On the issue of enhancing the scope of investigation, DHC rejected the arguments of the Petitioners that a specific order by CCI applying its mind into the role played by each of the Respondents was essential before DG could have proceeded with the enquiry.

On the last issue of the constitutional validity of section 27 (b) of the Act, the DHC held that it is not unconstitutional. However, DHC did give directions to the Commission and Central Government for taking some actions to ensure that law is followed in letter and spirit. In the end, though section 22(3) and section 53E (prior to amendment in 2017) were declared unconstitutional and void subject to the final decision of the SC in the writ petitions challenging the Finance Act, 2017 on section 53E but other provisions of the Act were held to be valid. In the end, as the Petitioners had not availed the option of filing Appeals before the Appellate Tribunal and approached DHC under writ jurisdiction, they were given 6 weeks of time to approach the Appellate Tribunal, if they so wished. Amongst the judgements which touched the core of the Act and its practice in India, this judgement of DHC shall rank as one of the prominent ones, in the same league as the order of Brahamdutt vs Union of India in times to come.

KK Sharma Law Offices

An initiative of Kaushal Kumar Sharma, ex-IRS, former Director General & Head of Merger Control and Anti Trust Divisions, Competition Commission of India, former Commissioner of Income Tax

4th Floor, Sishan House,
119, ShahpurJat,
New Delhi – 110049
India

+91-11-41081137
+91-11-49053075

www.kkslawoffices.com
globalhq@kkslawoffices.com
operations@kkslawoffices.com
legal@kkslawoffices.com